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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re S.M., a Person Coming Under the Juvenile Court Law.	B264369 (Los Angeles County Super. Ct. No. CK96544)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Sa. M. et al., Defendants and Appellants.	

APPEAL from orders of the Superior Court of Los Angeles County, Teresa Sullivan, Judge. Conditionally affirmed with directions on remand.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant Sa. M.

Lori N. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant Timothy M.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

In a previous appeal by Sa. M. (Mother), this court affirmed jurisdiction and disposition orders of the juvenile court removing now-three-year-old S.M. from Mother's custody and granting a restraining order barring her from approaching her husband, Timothy M., or the child. (*In re S.M.* (Aug. 20, 2014, B251450) [nonpub. opn.] (*In re S.M. I*).) Both Mother and Timothy now appeal from the order terminating their parental rights. Mother asserts she established the parent-child relationship exception to termination found in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).[1] She also contends the juvenile court abused its discretion in refusing to schedule a hearing on her petition for modification filed pursuant to section 388. Timothy contends the termination order must be reversed because the court failed to comply with the notification provisions of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq. (ICWA)). We affirm the juvenile court's order summarily denying Mother's section 388 petition and conditionally affirm the section 366.26 order, remanding the matter solely to allow the juvenile court to fully comply with ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Initial Petition and Appeal*

Mother and Timothy married in January 2012, and S.M. was born in November 2012 at an Orange County hospital. Two days after S.M.'s birth, the Orange County Social Services Agency (OCSSA) received a referral from the hospital because Mother had tested positive for cocaine. She denied using drugs, and both she and S.M. tested negative nine hours later. A second referral the same week alleged Mother had severely neglected S.M. during her interactions with him at the hospital. Citing her "paranoid delusions and thoughts," a hospital psychiatrist placed Mother on a psychiatric hold pursuant to section 5150. She was subsequently discharged with a preliminary diagnosis

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[1] Statutory references are to this code unless otherwise indicated.

of "psychotic disorder NOS," meaning her doctors could not make a definitive diagnosis without further evaluation.

OCSSA filed a petition to declare S.M. a dependent child of the juvenile court pursuant to section 300, subdivisions (b) (failure to protect or inability to provide regular care due to mental illness or substance abuse) and (j) (risk of abuse or neglect based on abuse of siblings), based on Mother's positive cocaine test and behavior in the hospital, and Timothy's criminal history, past use of marijuana and alcohol and prior experience with the dependency system with his other children. At the November 29, 2012 detention hearing the juvenile court found a prima facie showing had been made that S.M. came within section 300 and there was a substantial danger to his physical health and no reasonable means to protect him without removing him from his parents' custody. S.M. was placed in the temporary care and custody of OCSSA, and the agency was ordered to provide services to Mother and Timothy including monitored visitation. The minute order also noted Timothy's possible Comanche ancestry and deferred any finding under ICWA pending further investigation.

OCSSA filed a jurisdiction/disposition report on January 2, 2013 describing a number of interviews with Mother and Timothy. Mother denied any symptoms of mental illness and tested negative for drugs on four occasions in December 2012. Nonetheless, during visits with S.M. she exhibited paranoid delusions and anxiety about S.M. that interfered with her ability to care for him.[2]

In interviews with a Department social worker Timothy denied having a substance abuse problem and explained he drank occasionally and used marijuana twice a week to help him fall asleep after long work days. According to Timothy, Mother's erratic behavior had been triggered by cocaine, but he also agreed there were cultural and translation issues. In his view she had difficulties with social skills, and her paranoia was related to an inability to assimilate and understand social cues. He expressed concern

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[2] A more complete version of the facts relating to the jurisdiction/disposition proceedings is set forth in *In re S.M. I.*

about Mother's ability to parent S.M. in his absence. During visits he spent much of the time calming her anxiety and assuring her everything would work out. Asked about his Indian ancestry, Timothy told the social worker his Comanche ancestry was remote and "not enough to matter." The social worker pressed for more information but backed off when Timothy became angry about her continuing questions. In spite of Timothy's refusal to provide more details, the social worker sent notices to the Bureau of Indian Affairs and the Comanche Nation on December 13, 2012 with the information she already had.[3]

The OCSSA recommended the juvenile court sustain the petition and transfer the case to Los Angeles County for disposition based on the parents' place of residence. At a January 2, 2013 hearing the court found Timothy to be the presumed father.[4] At a subsequent hearing the court recorded that Timothy and Mother had submitted on the petition as amended and transferred the case to Los Angeles County. On February 11, 2013 the Los Angeles juvenile court accepted the transfer of jurisdiction from Orange County and appointed counsel for Mother and Timothy. Timothy again submitted an ICWA form with the juvenile court disavowing Indian ancestry. Based on Timothy's representations and the lack of any affirmative response following the OCCSA's mailing of notice to the Comanche Nation, the court found ICWA did not apply. The court ordered S.M. to remain in shelter care while the Los Angeles County Department of Children and Family Services (Department) assessed Timothy's home for placement.

Mother's anxiety and contentiousness during monitored visits with S.M. led the Department to recommend the baby remain in shelter care until Mother had left Timothy's

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[3] The notice advised the tribe of the child's name and date of birth, the names, addresses and dates of birth of his parents and Timothy's assertion of possible Comanche ancestry. OCCSA then filed the certified mail return receipts with the Orange County juvenile court.

[4] The minute order also stated that notice had been provided to the Bureau of Indian Affairs and appropriate tribes in accordance with ICWA. Further, based on a form completed by Timothy stating he had no Indian ancestry, the order stated, "Father denies any American Indian Heritage."

apartment and S.M. could be placed with his father. Placement with Mother was not recommended due to her previous psychotic behavior and failure to obtain recommended counseling and evaluation.

The disposition hearing began on April 17, 2013. Timothy's attorney filed a request for a restraining order against Mother based on threats she had made against Timothy and his landlords, who sometimes cared for S.M. Mother's counsel sought relocation of visits to a local mosque with a culturally sensitive monitor. The court granted those requests and released S.M. to Timothy over the Department's objection. The court also ordered Mother to undergo an Evidence Code section 730 evaluation by Daniel Kramon, a psychologist, pending the contested hearing.

Dr. Kramon concluded that, despite Mother's pleasant demeanor, "the content of much of her communication was characterized by suspicious type thinking, paranoid and bizarre ideations, likely distortion of reality and obsessive and rigid type thinking. . . . It is likely that when she perceives herself to be in a stressful situation, her anxiety significantly escalates, therefore exacerbating and intensifying the paranoid symptoms." Dr. Kramon noted the possibility of extended postpartum depression, but concluded, "[T]here are indications of paranoid tendencies that can be associated with a Paranoid Personality Disorder and/or Paranoid Schizophrenia." "A more specific diagnosis would be best determined by a more extensive evaluation, involving psychiatric/psychological consultations on a protracted basis but . . . , there are no current indications that the agitated/acting-out behavior . . . would be moderated without significant mental health intervention." Dr. Kramon recommended Mother receive individual psychotherapy and be evaluated for possible psychotropic medication, continue to have monitored visits with S.M., that "all efforts be made to find a monitor with whom she feels compatible," and reunification be deferred until there were reports of stabilization of her symptoms.

At the August 29, 2013 continued disposition hearing, the court removed S.M. from Mother's custody and ordered him placed with Timothy over the Department's objection. The court also extended the existing restraining order for a period of one year. We affirmed these orders in *In re S.M. I.*

2. *Post-disposition Proceedings and Termination of Parental Rights*

On February 27, 2014 the court held a review hearing under section 364. According to the Department report prepared for the hearing, Timothy had failed to participate in any court-ordered services, including drug testing. Although S.M. remained in the care of his father, the Department characterized that care as "marginal at best." The Department also reported Mother had received a diagnosis of major depressive disorder (without psychotic features) and also showed signs of delusional disorder. She was seeing a therapist only once per month and took her medication only when she felt she needed to do so. She had completed 10 of 20 required parenting classes but continued to obsess and complain about her son's health and development during weekly monitored visits. When confronted during her outbursts about S.M.'s condition, Mother would become agitated and yell at the monitors. Despite this behavior, the Department acknowledged she was loving and caring toward her son. Based on this report, the court maintained the home-of-parent order and set a further review hearing for August 28, 2014.

On March 11, 2014, however, the Department detained S.M. from Timothy and placed him in foster care. The Department filed a supplemental petition pursuant to section 387 alleging S.M. was at risk due to Timothy's continuing substance abuse, his failure to comply with orders he participate in drug and alcohol counseling, random drug and alcohol testing and parenting classes, and the termination of his parental rights to two older children. Neither Mother nor Timothy provided the Department with the names of relatives who could be considered for placement at the time of detention.

On April 29, 2014 the court conducted a jurisdiction/disposition hearing on the supplemental petition. According to the Department, Timothy had failed to visit S.M. since his detention, stating he was instead focusing on complying with the court-ordered reunification services to regain custody. Mother remained in a shelter and had not been able to find employment. Visit monitors reported she continued to worry about S.M.'s health and accused the foster parents of failing to clothe or feed him adequately. She also appeared frustrated by S.M.'s age-appropriate behaviors, wanting him to sit quietly in her lap and eat even when he was not hungry. Based on the report, the court sustained the

petition, removed S.M. from Timothy's custody and ordered the Department to provide the parents with reunification services and continued monitored visitation.

The six-month review hearing (§ 366.21, subd. (e)) was set for October 28, 2014 and rescheduled for contest after the Department recommended termination of reunification services. In the status report submitted on October 24, 2014 the Department advised the court Timothy had again failed to show up for drug testing and, although he had completed a parenting class, had not visited S.M. at all, claiming his job prevented his compliance with the court-ordered drug testing and visitation. Mother had completed her parenting class but continued to be noncompliant with recommended mental health treatment. Her diagnosis was reported as major depressive disorder, recurrent, severe with psychotic features, an assessment the Department echoed, reporting she "has no recognition whatsoever that she suffers from paranoid delusions [that] render her incapable of providing a safe environment for her very young child. Hearing and reading mother's own words, it is clear . . . that mother is detached from the fact that she needs serious help. Mother's actions of not taking her psychotropic medication as prescribed are another strong indication that mother does not even believe that she needs to be on medication." During visits with S.M. Mother continued to complain about the care he was receiving from the foster parents and to argue with social workers about her interaction with her son.

In a last-minute information filed before the contested six-month review hearing, the Department reported that Timothy had again failed to visit S.M. or submit to drug testing. He had also been drunk and abusive when he came to Mother's new apartment. Although Mother was attending therapy sessions, she was not taking the psychotropic medication prescribed for her because of her belief there was nothing wrong with her. The Department again recommended termination of reunification services and pursuit of an alternative permanent plan for S.M. At the hearing on December 11, 2014 the court found the parents were in partial compliance with their case plans but that S.M. could not be returned to their physical custody. The court terminated reunification services and set a selection and implementation hearing (§ 366.26) for April 9, 2015.

In February 2015 Timothy's great aunt, a resident of Tennessee, filed a request for disclosure of records from S.M.'s case file and advised the court of her desire to adopt S.M. She stated she had not been aware of the dependency proceedings until January 2015. On March 27, 2015 Mother filed a section 388 petition seeking modification of the order terminating reunification services and removing S.M. from her custody. She asserted she no longer suffered from delusional symptoms that required medication and had obtained new housing.

In its report for the section 366.26 hearing, the Department advised the court that Timothy had an affectionate relationship with S.M. but had visited with his son on only three occasions and continued to abuse drugs. Mother's visits were consistent and, although her skills were progressing, she continued to complain about his care and interact inappropriately with S.M. at times. After 25 months of reunification services neither parent had resolved the problems that led to S.M.'s detention. On the other hand, the foster parents had provided S.M. with more than a year of stable care; he was bonded to them; and their home study had been approved. Based on these facts, the Department recommended termination of parental rights and selection of the permanent plan of adoption. With respect to the paternal great aunt, the Department did not recommend an interstate home study unless the current plan with the prospective adoptive family fell through.

At the April 9, 2015 hearing the court summarily denied Mother's section 388 petition, finding it had failed to state new evidence or a change of circumstances. The court ordered the Department to initiate a home study as requested by the great aunt. The section 366.26 hearing was continued to May 20, 2015 for contest.

On May 20, 2015, after taking testimony from the parents, the court found S.M. to be adoptable and designated the foster parents as the prospective adoptive parents. The court also found it would be detrimental to return S.M. to his parents and terminated the parental rights of Mother and Timothy.

DISCUSSION

1. *The Juvenile Court Did Not Abuse Its Discretion by Summarily Denying Mother's Section 388 Petition*

Section 388 provides for modification of juvenile court orders when the moving party presents new evidence or a change of circumstances and demonstrates modification of the previous order is in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919; see Cal. Rules of Court, rule 5.570(e).) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both of these elements. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1504; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; accord, *In re Brittany K.*, at p. 1505.) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.*, at p. 189.)

Even if a parent presents prima facie evidence supporting the allegations of changed circumstances contained in the petition, "[a] petition [that] alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47; accord, *In re Mary G.* (2007) 151 Cal.App.4th 184, 206.) The parent must "show that the undoing of the prior order" would be in the child's best interests. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529; accord, *In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) In *In re Jasmon O.*, *supra*, 8 Cal.4th at pp. 408, 414-422 the Supreme Court "made it very clear . . . that the disruption of an existing psychological bond between dependent children and their *caretakers* is an extremely important factor bearing on any section 388 motion."

(*Kimberly F.*, at p. 531.) Because time is of the essence to young children, when it comes to securing a stable, permanent home, prolonged uncertainty is not in their best interest. (See *In re Josiah Z.* (2005) 36 Cal.4th 664, 674 ["'[t]here is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged'"].)

We review the summary denial of a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re Brittany K., supra,* 127 Cal.App.4th at p. 1505.) We may disturb the juvenile court's exercise of that discretion only in the rare case when the court has made an arbitrary, capricious or "patently absurd" determination. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

Mother's petition, filed after the termination of reunification services, did not meet this high threshold. Mother asked that custody of S.M. be returned to her but did not provide the court with evidence her mental illness was now under control and would have no detrimental impact on S.M. She asked for continued reunification services only if the court were not to return S.M. directly to her custody. The dependency court judge plainly understood her discretion to modify these orders upon an adequate showing and properly exercised that discretion in denying the petition without an evidentiary hearing: Mother had already been provided 25 months of reunification services, even though those services could have been terminated at the initial six-month review hearing because S.M. was under the age of three at the time of his detention. (See § 361.5, subd. (a)(1)(B), (C).) Throughout the reunification period Mother only sporadically participated in court-ordered mental health counseling and treatment, attending counseling sessions less than monthly and refusing to take medication as prescribed. None of these conditions had changed. Other than insisting her son needed to be with his family, she made no showing further delay in implementing a permanent plan would be in his best interests.

While we do not question the sincerity of Mother's statement that she loves her son and wants to reunify with him, more is required. (See, e.g., *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687.) The focus of a section 388 petition must be on the child's

needs and circumstances (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 960); Mother failed to show that providing additional reunification services to her would in any way satisfy those needs.

2. *Mother Failed To Establish the Parent-Child Relationship Exception to Termination of Parental Rights*

Section 366.26 governs the juvenile court's selection and implementation of a permanent plan for a dependent child. The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) Once the court has decided to end parent-child reunification services, the legislative preference is for adoption. (§ 366.26, subd. (b)(1); *In re S.B.* (2009) 46 Cal.4th 529, 532 ["[i]f adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child"]; *In re Celine R.* (2003) 31 Cal.4th 45, 53 ["[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child."]; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [once reunification efforts have been found unsuccessful, the state has a "compelling" interest in "providing stable, permanent homes for children who have been removed from parental custody" and the court then must "concentrate its efforts . . . on the child's placement and well-being, rather than on a parent's challenge to a custody order"]; see *In re G.B.* (2014) 227 Cal.App.4th 1147, 1163.)

Section 366.26 requires the juvenile court to conduct a two-part inquiry at the selection and implementation hearing. First, it determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250; *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory

exceptions applies. (§ 366.26, subd. (c)(1)(A) & (B); see *Cynthia D.*, at pp. 250, 259 [when child adoptable and declining to apply one of the statutory exceptions would not cause detriment to the child, the decision to terminate parental rights is relatively automatic].)

One of the statutory exceptions to termination is contained in section 366.26, subdivision (c)(1)(B)(i), which permits the court to order some other permanent plan if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The "benefit" prong of the exception requires the parent to prove his or her relationship with the child "'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'" (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643; accord, *In re Amber M.*, *supra*, 103 Cal.App.4th at p. 689; see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 ["the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer"].)

A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 466 ["[a] biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent"].) No matter how loving and frequent the contact, and notwithstanding the existence of an "'emotional bond'" with the child, "'the parents must show that they occupy "a parental role" in the child's life.'" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) Factors to consider include "'[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs.'" (*In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643.)

The parent has the burden of proving the statutory exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The court's decision a parent has not satisfied this burden may be based on either or both of two component determinations—whether a

beneficial parental relationship exists and whether the existence of that relationship constitutes "a compelling reason for determining that termination would be detrimental to the child." (§ 366.26, subd. (c)(1)(B); see *In re K.P.*, *supra,* 203 Cal.App.4th at p. 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) When the juvenile court finds the parent has not established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as a matter of law. (See *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1528.)[5] When the juvenile court concludes the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. (*In re K.P.*, at pp. 621-622; *In re Bailey J.*, at pp. 1314-1315.)

Mother contends the evidence established she had maintained regular visitation and contact with S.M. and their relationship was beneficial to him. Mother's visits, however, were monitored and almost always required intervention from the monitor to assist Mother in appropriate interaction with S.M. Mother's behavior during these visits revealed the serious burdens associated with her mental illness, which she continued to minimize. Moreover, absent extraordinary circumstances not present here, weekly supervised visitation does not create the opportunity for a mother or father to assume a parental role in the child's life and is typically insufficient to outweigh the statutory preference for adoption. (See *In re K.P.*, *supra,* 203 Cal.App.4th at p. 621 ["[t]he relationship that gives

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[5] Because the juvenile court's factual determinations are generally reviewed for substantial evidence, it has often been posited a challenge to a finding that no beneficial relationship exists is similarly reviewed for substantial evidence. (See, e.g., *In re Bailey J.*, *supra,* 189 Cal.App.4th at p. 1314; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Indeed, Mother argues there was substantial evidence to support the subdivision (c)(1)(B)(i) exception. The parent's failure to carry his or her burden of proof on this point, however, is properly reviewed, as in all failure-of-proof cases, for whether the evidence compels a finding in favor of the appellant as a matter of law. (See *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 ["where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law"]; *In re I.W., supra*, 180 Cal.App.4th at pp. 1527-1528 [same].)

rise to this exception to the statutory preference for adoption 'characteristically aris[es] from day-to-day interaction, companionship and shared experiences'"]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [while day-to-day contact is not required, it is difficult to demonstrate a beneficial parent-child relationship when visits remain monitored]; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1109 [parent's failure to progress beyond monitored visitation with a child and to fulfill a "meaningful and significant parental role" justifies order terminating parental rights].)

Additionally, there was no evidence termination of Mother's rights would deprive S.M. "of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed." (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466 [italics in original].) Although S.M. often played well with Mother, he had also bonded with his foster parents and was thriving in their home. As those parents confided to the social worker, S.M. frequently experienced stress and nightmares after his visits with Mother. That anxiety was not going to be ameliorated short of implementing a permanent plan for S.M. in the home he had been living in for the last year of his short life. The juvenile court properly exercised its discretion in concluding the evidence here was insufficient to warrant application of the parent-child relationship exception.

3. *The Availability of New Evidence Requires a Limited Remand To Allow the Department To Comply with ICWA*

Timothy contends he wrongly denied Indian ancestry at the beginning of the case because he believed he was required to be a registered or enrolled member of the tribe before claiming such ancestry. He continues to believe he has Comanche ancestry on his mother's side and argues the Department (and OCSSA before it) failed to comply with the required ICWA notification procedure.

ICWA reflects a congressional determination that it is in the best interests of Indian children to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations. (25 U.S.C. § 1902; see *In re H.G.* (2015) 234 Cal.App.4th 906, 909-910; *In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1355-1356; see also § 224, subd. (a).) It is intended to protect Indian children and to promote the stability and

security of Indian tribes and families. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 173-174; see also *In re Suzanna L.* (2002) 104 Cal.App.4th 223, 229.) For purposes of ICWA, an "Indian child" is a child who is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4); § 224.1, subd. (a) [adopting federal definitions].)

ICWA provides, "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe" of the pending proceedings and its right to intervene. (25 U.S.C. § 1912(a); see *In re S.B.* (2005) 130 Cal.App.4th 1148, 1157.) Similarly, California law requires notice to the Indian custodian and the Indian child's tribe in accordance with section 224.2, subdivision (a)(5), if the Department or court knows or has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (d).) The circumstances that may provide reason to know the child is an Indian child include, without limitation, when a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's parents, grandparents or great-grandparents are or were a member of a tribe. (§ 224.3, subd. (b)(1); see also *In re B.H.* (2015) 241 Cal.App.4th 603, 606-607 ["a person need not be a *registered* member of a tribe to be a member of a tribe—parents may be unsure or unknowledgeable of their own status as a member of a tribe"].)

Juvenile courts and child protective agencies have "'an affirmative and continuing duty'" to inquire whether a dependent child is or may be an Indian child. (*In re H.B.* (2008) 161 Cal.App.4th 115, 121; § 224.3; Cal. Rules of Court, rule 5.481.) As soon as practicable, the social worker is required to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.3, subd. (c); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539; Cal. Rules of Court, rule 5.481(a)(4).)

There is no question OCSSA attempted to elicit the necessary information relating to Timothy's Indian ancestry by questioning Timothy, who refused to cooperate with the investigation.[6] Notice was provided to the Bureau of Indian Affairs and the Comanche Nation using the information available at the time, although the notice omitted Timothy's middle name, "John," and the state of his birth, Washington, both of which appeared on the verification of birth form issued by the hospital in which S.M. was born. Timothy's failure to cooperate, however, does not end the inquiry. The interest at stake belongs to the tribe, not Timothy. At a minimum, the Department can contact Timothy's great aunt (who appears to be in contact with many family members) to obtain additional information, including the names and birthdates of Timothy's parents, grandparents and great-grandparents, if available, information that will allow the Comanche Nation to make a considered assessment as to whether S.M. is an Indian child.

Consequently, the section 366.26 order, which incorporated the invalid IWCA finding, may only be conditionally affirmed. A limited remand is required: Upon remand the juvenile court shall direct the Department to make further inquiries regarding S.M.'s ancestry and possible Indian status (§§ 224.1, 224.3) and, if appropriate, send a revised ICWA notice to the Comanche Nation in accordance with ICWA and California law. (See § 224.2, subd. (a); *In re Jovanni B.* (2013) 221 Cal.App.4th 1482, 1495; *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1169.) The Department shall thereafter notify the court of its actions and file certified mail return receipts for any ICWA notices that were sent together with any responses received. The court shall then determine whether the ICWA inquiry and notice requirements have been satisfied and whether S.M. is an Indian child. If the court finds he is an Indian child, it shall conduct a new section 366.26 hearing, as well as all further proceedings, in compliance with ICWA and related California law. If not, the court's original section 366.26 order remains in effect.

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[6] Timothy's lack of cooperation has extended to this Court as well. After authorizing an appeal based on the Department's failure to comply with ICWA, Timothy has apparently failed to cooperate with his appellate counsel, who also has been unable to obtain from Timothy the relevant information about his Indian ancestry.

DISPOSITION

The order summarily denying Mother's section 388 petition is affirmed. The section 366.26 order of the juvenile court is conditionally affirmed. The matter is remanded for compliance with ICWA and related California law as set forth above.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.